Supreme Court, U.S.
FILED
No. 05-___ 051470 MAY 15 2006
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

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IN THE MATTER OF THE GROSS PRODUCTION AND PETROLEUM EXCISE TAX PROTEST OF RUDOLPH BRUNER,
*Protestant/Appellant*,

v.

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION,
*Respondent/Appellee.*

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**On Petition for Writ of Certiorari to the Oklahoma Supreme Court**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Question # 1: Is § 3 of the Act of May 10, 1928, 45 Stat. 495 [Appendix D-1] (and the identical provisions contained in the Acts of February 14, 1931, 46 Stat. 1108 and March 12, 1936, 49 Stat. 1160) subjecting minerals produced on restricted allotted lands of the Five Civilized Tribes after April 26, 1931, to all taxes, State and Federal, **Unconstitutional** under the following established facts? (i) Allotments were selected under the *Curtis Act* (Act of June 28, 1898, 30 Stat. 495) which provided [Appendix D-2] that the allotments were "nontransferable until after full title is acquired" and "shall be nontaxable while so held"; (ii) The land involved in this matter was selected by a full-blood Creek Indian under the *Curtis Act* of 1898 in February, 1900; (iii) The allotment was confirmed in § 6 of the Original Creek Treaty (1901); (iv) One third of the allotment descended to this full-blood Creek Indian Appellant; and (v) Appellant and the land are still restricted.

Ancillary thereto: How could the Oklahoma and lower Federal Courts totally and without explanation ignore the **Solemn Contract** between Miller Bruner, **a full-blood Creek Indian,** (not the Creek Tribe) and the **United States?**

The stipulation (in Record on Appeal page 99) shows that **he selected his allotment in February, 1900.** That was prior to both the Original and Supplemental Creek Treaties in 1901 and 1902 on which the lower Courts relied, even though the Treaties were compatible with the *Curtis* Act (i.e. nontaxable while nonalienable). His contract with the United States gave him a **vested property right, of tax exemption while restricted,** protected by the **Fifth Amendment** to the United States Constitution (Appendix D-3), under the *Curtis Act,* under the authority of *Choate v. Trapp*, 224 U.S. 665 (1912) (Appendix D-7).

Question # 2: Is the Statute of Limitations tolled as to restricted [non-competent] Indians as determined by the

Oklahoma Court of Appeals but denied by the Tenth Circuit Court of Appeals in *Richard Bruner, Jr. and Betty Bruner v. United States* [Appendix C] December 21, 2005, but not decided in the District Court for the Northern District of Oklahoma?

## LIST OF PARTIES

The case caption contains the names of all parties to this proceeding.

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## OFFICIAL ORDERS AND OPINIONS IN THIS CASE

1. Reported Decision of the Oklahoma Court of Appeals Vol. 77 page 1021 of March 25, 2006, (Appendix A)
2. Order of the Supreme Court of the State of Oklahoma dated February 21, 2006, 100,536 Denying Certiorari (Appendix B)
3. Order and Judgment of the Tenth Circuit Court of Appeals dated December 21, 2005 (Appendix C).

## THE BASIS FOR JURISDICTION

(i) The date of the Order of the Oklahoma Supreme Court of the State of Oklahoma was February 21, 2006.

(ii) The Statutory provision to confer this Court with Jurisdiction is Rule 13, Supreme Court Rules.

The jurisdiction of the Court of first instance in this matter is:

68 O.S. Supp. 1994 §§ 1001 and 1101; Supp. 1994, § 1008; Supp. 1991 § 1106; Supp. 2001 § 225(A); Supp. 2001 §§ 201 through 263

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE.

1. The Fifth Amendment to the U.S Constitution. (Appendix D-3)

2. § 7 of the Original Creek Treaty, 31 Stat. 861 (Appendix D-4)

3. § 6 of the Original Creek Treaty (Appendix D-6), confirming the allotments under the Curtis Act and § 23 thereof (Appendix D-22)

4. § 16 of the Supplemental Creek Treaty, 32 Stat. 500 (Appendix D-4)

The Statutes are:

1. Section 11 of the Curtis Act (Act of June 28, 1898, 30 stat. 495) (Appendix D-2);

2. Act of April 26, 1906 (34 Stat. 137) (Appendix D-4);

3. Act of May 10, 1928 (45 Stat. 495) (Appendix D-4);

4. Act of August 11, 1955 (69 Stat. 666) (Appendix D-4);

5. Act of June 18, 1934 (48 Stat. 984) (now 25 U.S.C. § 462) (Appendix D-4);

6. Act of May 24, 1990 (104 Stat. 207) (now 25 U.S.C. § 478-1) (Appendix D-4) extending the restrictions on alienation to the present time;

7. 25 U.S.C. § 405 (Act of March 1, 1907, 34 Stat. 1018) (Appendix D-5 and D-15);

8. Act of May 10, 1928 (45 Stat. 495) imposing State and Federal taxes on mineral production from restricted allotted lands of the Five Civilized Tribes (Appendix D-1) and extending restrictions and nonencumbrance (Appendix D-4);

9. Act of May 27, 1908 (35 Stat. 312) (Appendix D-15);

10. Act of March 1, 1907 (34 Stat. 1015, 1018, 25 U.S.C. § 405) (Appendix D-5);

11. Act of August 1, 1914, (38 Stat. 601, as amended by the Act of June 25, 1948, 62 Stat. 859 (25 U.S.C. 86) (Appendix D-15);

12. Act of June 14, 1918 (40 Stat. 606) (25 U.S.C. § 355) (Appendix D-15);

13. Act of August 11, 1955 (69 Stat. 666) (25 U.S.C. § 372), 25 U.S.C. §§ 396c, 396d, 282, 283, 2 and 18 U.S.C. § 1154 (Appendix D-15) establishing guardianship of the United States over members of the Five Civilized Tribes;

14. 25 U.S.C. §§ 161a, 162a, 4001, 4041, 4042, 4043 (Appendix D-16) establishing trustee/cestui que trust relationship of United States and members of the Five Civilized Tribes Indians;

15. 26 U.S.C. § 6321 (tax lien) Appendix D-27;

16. Code of Federal Regulations 25 C.F.R. §§ 152.13 and 152.14 defining "competency" of a Five Civilized Tribes Indian (Appendix D-5); and

17. Treas. Reg. § 301.6321-1 (Appendix D-27).

## STATEMENT OF THE CASE

Miller Bruner (Grandfather of Appellant) was a full-blood Creek Indian who selected his 160 acre allotment in February, 1900, (ROA p. 99) under the mandatory provisions of the *Curtis Act* (Act of June 28, 1898, 30 Stat. 495), covering the Five Civilized Tribes, and gave, in consideration therefor, his communal property rights in over 3,000,000. acres of fee interest of the Creek Tribe. *Woodward v. DeGrafenried*, 238 U.S. 284 (1915) (Appendix D-9). The allotment was confirmed in § 6 of the Original Creek Treaty (Appendix D-6).

This allotment descended through Dick Bruner (Appellant's Father) to Appellant and his two Brothers in equal shares. (ROA pp 99, 100, 101)

Appellant and his Brothers executed oil and gas leases on the allotment in 1983 which were approved by the District Court of Hughes County, Oklahoma, at which hearing they were counseled by the United States Probate Attorney. (ROA pp 100-124)

Legislation has extended restrictions against alienation to the present time and until Congress removes the same. (Appendix D-4) The non-taxability is coterminous with the restrictions against alienation under § 11 of the Curtis Act supra, which: "Provided, that the lands allotted shall be nontransferable until after title is acquired * * * and shall be nontaxable while so held." (Appendix D-2) The Original (§ 7) and the Supplemental (§ 16) Creek Treaties, in conformity therewith, contain coterminous periods. (Appendix D-4) Both the allotment and Appellant are still restricted. The lower Courts latched onto the period (21 years for the homestead) contained in the treaties of nontaxable and nonalienable to deny the unconstitutional issue. But they totally ignored the *Curtis Act* under which Miller Bruner contracted with the United States for nontaxable while nonalienable (not limited to 21 years). The Treaties were compatible with § 11 of the

*Curtis Act* (i.e. nontaxable while nonalienable). The Tribe and the United States apparently believed, at that time [1901], 21 years was sufficient. It was not.

The Oklahoma Tax Commission has collected gross production and petroleum excise taxes on the oil and gas produced from the restricted allotted land since first production under the leases executed in 1983. (ROA pp 125-129)

## ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

**QUESTION 1:** This is an important Constitutional issue affecting many Five Civilized Tribes Indian citizens of this Nation.

First:

The Oklahoma Court of Appeals, the Federal District Court and the Tenth Circuit Court of Appeals all decided this issue contrary to the "vested property right" established by this Court in *Choate v. Trapp*, 224 U.S. 665 (1912) involving members of the Chickasaw and Choctaw Tribes (Appendix D-7), *English v. Richardson*, 224 U.S. 680 (1912) involving a Creek Indian (Appendix D-8) and others. It arises by reason of all three Courts' failure to recognize the Solemn (forced by the United States under the mandatory allotment provisions in § 11 of the *Curtis Act*) contractual agreement between Mr. Bruner (not the Creek Tribe) and the United States. Mr. Bruner furnished consideration, "if any was needed" by releasing his communal property rights in the Creek Tribe properties. This was mandated by § 23 of the Original Creek Treaty which provided that selection of the allotment relinquished his communal property rights [Appendix D-22]). The contractual agreement was under the same § 11 of the *Curtis Act* which provided, **explicitly,** for **nontaxability** during the period of **nonalienation (i.e.** the identical periods of time were tied together, inseparably to protect the allottee and his heirs from themselves and from the taxing authorities).

The Oklahoma Supreme Court failed to respond and denied certiorari.

The decisions also ignored the holding of this Court in *Woodward v. DeGrafenried*, 238 U.S. 284 (1915) (Appendix D-9) which held that the heirs, of a Creek Freedwoman who selected her allotment under the *Curtis Act*, containing obligatory provisions, and died before the Original Creek Treaty became effective, inherited a fee simple interest (i.e. the fee was vested upon selection of the allotment).

For that same reason the tax exemption was also vested upon selection of the allotment.

The decisions also disregarded the opinion of the Supreme Court of Oklahoma in *Carter Oil Co. v. Oklahoma Tax Commission*, 25 P. 2d 1092 (1933) (Appendix D-10) involving a gross production tax on production, after April 26, 1931, from a restricted allotted land. The Court held the 1928 Act Constitutional as to the **non-Indian lessee** but stated, in dictum the **Act was unconstitutional** as to the Indian.

A **tax** on the **royalty** interest is a **tax** on the **fee.** *Carpenter v. Shaw*, 280 U.S. 363 (1930) (Appendix D-11)

This Court indicated, in *Oklahoma Tax Commission v United States*, 319 U.S. 598 (1943) (Appendix D-12), "(w)hen Congress wants to require both non-alienability and non taxability it can, as it has so often done" and cited, in Footnote 11 thereto, **"inalienable and nontaxable"** in the *Curtis Act*. The *Curtis Act* **did,** explicitly, provide for **non taxability during nonalienability.** Miller Bruner selected his allotment in February, 1900, under the *Curtis Act*. The *Curtis* language of "nontransferable" and "nontaxable while so held" **has** to **mean something.** *Potter v. United States*, 155 U.S. 438 (1894) (Appendix D-13)

*Choate v. Trapp*, supra, and *English v. Richardson*, supra are authority for the "vested property right to exemption" i

this matter. *Choate* held the Indians there acquired their rights under the *Curtis Act*. (Appendix D-7) The Atoka Agreement (Appendix D-21) was incorporated in the *Curtis Act* (§ 29) but was **amended as provided in the Curtis Act** (Appendix D-21), in § 11, that the lands allotted would be "nontransferable until after full title is acquired" and "shall be nontaxable while so held." (Appendix D-2) *English v. Richardson* [Creek] adopted the *Choate* rationale. Miller Bruner selected his allotment under the *Curtis Act*, before the Original Creek Treaty and before the patents were issued. *Gleason v. Woods*, 224 U. S. 679 (1912) (Appendix D-23) resolved the issues there in accordance with *Choate. Board of County Commissioners of Tulsa County, Okla. v. United States*, 94 F. 2d 450 (1938) (Appendix D-24) held that the relationship **was contractual.** Also *The Lands of the Five Civilized Tribes*, by Lawrence Mills, F. H. Thomas Law Book Company (1919) (Appendix D-25) reiterated that the period of exemption from taxation is coextensive with the period of restriction. In *H. Rep. No. 2415*, 71st Cong. 3rd Sess., p. 1 (in 1931) (Appendix D-26), it was recognized that the Five Civilized Tribes Indians are **tax exempt while restricted.** The land is still "nontransferable" and is still "nontaxable".

As indicated by this Court in *Squire v. Capoeman*, 351 U.S. 1 (1956) (Appendix D-20), involving a general allotment Indian: "it is not **lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian"** and to do so under these circumstances [collecting an unconstitutional (income) tax by the guardian and trustee from the ward and cestui que trust and allowing Oklahoma to collect the unconstitutional (income, gross production and petroleum taxes from the United States' ward and cestui que trust] would "be 'at least, a **sorry breach of faith** with" this Indian.

Second:

The 1928 Act, **contrary** to its providing for the taxation of the minerals produced, **provided** that the restriction against

alienation and "encumbrance" of the lands be extended for twenty-five years from April 26, 1931. Subsequent Acts extended the restrictions until removed by Congress. (Appendix D-4)

Taxes are a lien ("incumbrance") on the restricted allotted lands. *Black's Law Dictionary, Chickasaw and Choctaw Nations v. U.S., Joseph T. Kiefer et ux v. Comm.,* 26 U.S.C § 6321 and *Treas. Reg.* § 301.6321-1. (Appendix D-27). The clear language of § 11 of the Curtis Act of: nontransferability, nonencumbrance and nontaxability while so held coupled with the extension of restrictions and nonencumbrance, since April 26, 1931, which are still in place today, make these lands **non-taxable** until the **restrictions** are removed by Congress. They have not been removed.

**QUESTION 2:** This is a vital jurisdictional issue to many Five Civilized Tribes Indian citizens of this Nation. The 1928 Act affects taxes collected by the United States (income) and the State of Oklahoma (income, gross production and petroleum excise) on oil and gas produced from restricted allotted lands after April 26, 1931. If the statute of limitations is a bar in these matters, it would eliminate the affected Indians' ability to recoup the unconstitutional taxes (in breach of its Solemn agreement with the Individual Indians) collected in earlier than the preceding three years (i.e. as much as 72 years' of taxes)! This would be intolerable.

There is a disparity between the Tenth Circuit Court of Appeals decision (statute of limitations not tolled) and the Oklahoma Court of Appeals decision (statute of limitations tolled).

The Tenth Circuit Court of Appeals decision erroneously relied on cases that did not involve restricted allotted lands of restricted Five Tribes Indians. It cited this Court's *Brockamp* decision. It likewise did not involve a restricted Five Tribe

Indian's restricted allotment. The differences result in a tolling of the statute of limitations here:

First: **After** the *Brockamp* decision the Internal Revenue Service issued a Service Center Advice (Appendix D-17) confirming that the § 6511 limitations are tolled until the restrictions are removed. It relied on *Choate v. Trapp*, supra, for liberal construction of laws; on Attorney General Harlan F. Stone's 34 Op. A. G. 302 placing blame on the Government agent for not timely seeking the refund) and on *Nash v. Wiseman* (Appendix 14), *Dodge v. United States* (Appendix D-14), and *Daney v. United States* (Appendix 14). The Attorney General's Opinion (Appendix D-14) reasoned that inasmuch as the tax statutes do not apply, he saw no reason for the statute of limitations to apply.

The Service Center Advice dealt with allotments held in trust by the United States for Indians (trust allotments) and not restricted allotments. But, "as respects both classes—one as much as the other—United States "possesses a supervisory control over the land" and there is "no substantial difference * * * between restricted property and trust property." (Appendix D-18)

Second: Authorities dealing with non-competent restricted Indians hold that a refund claim may be filed at any time, even after the statute of limitations has expired. *Merten's Law of Federal Taxation* (Appendix D-14) A restricted Indian is a ward of the Government and can file a refund claim at any time. *Nash v. Wiseman* (Appendix D-14) The **noncompetency** of an Indian tolls the applicability of the statute of limitations. *Daney v. U.S.* (Appendix D-14), affirmed on another issue *U.S. v. Daney*, 370 F. 2d 791). It was the duty of the Secretary of Interior, acting as guardian of a restricted non-competent Indian, to determine if taxes were due and to file any claims for refund therefor [should apply as well to unconstitutional taxes]. *Harrington v. U.S.* 70-1 USTC § 9215 (Appendix D-14) Tolling applies as well to refund

claims by the Indian taxpayers as those filed by the Secretary and regardless of what assets were used to pay the taxes. *Dodge v. U.S.* (Appendix D-14).

The United States, through IRS, conceded, in *Clark* v. *U.S.*, (Appendix D-14) (involving a Chickasaw Indian), that the statute of limitations does not apply to tax-exempt income from allotted and restricted lands. The statute begins to run when the noncompetency status is lifted. (Appendix D-14) See also reasoning in *Swietlik v. U.S.*, 779 F. 2d 1306. (Appendix D-14).

Third: With respect to noncompetency—The term "non" means "not", "a prefix of negation". "Competent" means "duly qualified", "having authority" and "possessing requisite legal qualification". "Restricted lands" means "Lands the alienation of which is subject to restrictions imposed by Congress to protect the Indians from their own supposed **incompetency.** 25 U.S.C.A. § 331 note. *Kenny v. Miles* * * * 250 U.S. 58 * * *." (Emphasis supplied) (Black's Law Dictionary, Fourth Edition, Appendix D-14) 25 U.S.C. § 405 (Act of May 1, 1907, 34 Stat. 1018) requires that any **non-competent** Indian may sell his allotment only on such terms and conditions as the Secretary of Interior may prescribe (Appendix D-4) In *United States v. Mitchell II*, 463 U.S.206 on page 227 (Appendix D-16) this Court stated: "It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of **competency**." (Emphasis supplied) This Court further speaks, in *Alaska v. Native Village of Venetie Tribal Gov't.*, 522 U.S. 520 (Appendix D-14) (1998, **after** *Brockamp*, supra), relating to the federal government's active controls of the lands and effectively acting as a guardian of the Indians relating to "**guardianship** and **protection** of the Indians". (Emphasis supplied)

Fourth: This Court, in *Choate v. Trapp*, supra, recognized that at least two of the Five Civilized Tribes are "**wards o**

**the nation**". (Appendix D-7) See also *Com'rs of Love County Oklahoma v. U.S.*, 253 U.S. 17 (1920) stating that:

> "The claimants, * * * were members of the **Choctaw** Tribe and **wards** of the United States." (Emphasis supplied)

The acts and statutes, pertaining to the Five Civilized Tribes Indians, confirm a guardian/ward relation between the United States and the Indians. See Act of May 27, 1908, Act of March 1, 1907 (34 Stat. 1015, 1018, 25 U.S.C. 405), Act of August 1, 1914, 38 Stat. 601, as amended by the Act of June 25, 1948, 62 Stat. 859 (25 U.S.C. § 86), Act of June 14, 1918, 40 Stat. 606 (25 U.S.C. § 355) § 2, Act of August 11, 1955 (69 Stat. 666), § 5, 25 U.S.C. § 372, 25 U.S.C. § 396c, 25 U.S.C. 396d, 25 U.S.C. § 282, 25 U.S.C. § 283, 25 U.S.C. § 2, and 18 U.S.C. § 1154 (Appendix D-15).

A guardian has the highest fiduciary duty to its ward.

Fifth: This Court, in *United States v. Mitchell (II)*, supra, a case involving statutes no more controlling of the Indians than in the instant case, reported that the Interior Department recognized its obligation to supervise operations and spoke of a "sacred trust" between the Indians and the Government. It stated: "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and **property** belonging to the Indians. All the necessary elements of a **common-law trust** are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). Footnote 30. See Restatement (Second) of Trusts §2 * * *." (Emphasis supplied) (Appendix D-16)

In addition to the acts and statutes (in Fourth, above) the following acts and statutes confirm a trustee/cestui que trust relationship between the United States and the Five Civilized Tribes Indians: 25 U.S.C. § 161a, 25 U.S.C. § 162a, 25

U.S.C. § 4001, 25 U.S.C. § 4041, 25 U.S.C. § 4042, and 25 U.S.C. § 4043. (Appendix D-16)

Sixth: The statute of limitations does not run between the trustee and the cestui que trust as long as the trust subsists. (54 C.J.S. *Limitations of Actions* § 21) (Appendix D-19). Good faith and fair dealing are required of the United States and the statute of limitations will begin to run against the cestui que trust from the time the trustee repudiates the trust. *United States v. Taylor*, 104 U.S. 216 (1881), *Harrison v. Eaves*, 130 P. 2d 841, (Okl., 1942), *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, and *Hopeland Band of Pomo Indians v. United States*, 855 F. 2d 1573. (Appendix D-19) Here, the United States still claims to be acting as Trustee, but is collecting an unconstitutional income tax from its ward and cestui que trust and allowing Oklahoma to collect unconstitutional income, gross production and petroleum excise taxes from its ward and cestui que trust.

## CONCLUSION

Finally: This Court has recognized the "distinctive obligation of trust incumbent upon the Government", requiring the most exacting fiduciary standards and the most uncompromising rigidity. *Seminole Nation v. United States*, 316 U.S 286 (Appendix D-20). It is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian. *Squire v. Capoeman*, 351 U.S. 1 (Appendix D-20)

For the United States, as Guardian and Trustee for these dependent people and collector of an unconstitutional tax from them, and allowing Oklahoma to collect these unconstitutional taxes from them, would according to *Squire,* supra,:

"be 'at least, a sorry breach of faith with these Indians.'"

Respectfully submitted,

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